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APPELLEE'S PETITION FOR REHEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,152

PACKARD MOTOR CAR COMPANY, ET AL.,

Appellants,

v.

THE WEBSTER MOTOR CAR COMPANY,

Appellee.

Appeals from The United States District Court for the District of Columbia

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District of Columbia Circuit
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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLEE'S PETITION FOR REHEARING IN BANC

The Webster Motor Car Company petitions for rehearing in banc of the appeal in the above treble-damage antitrust action, in which a divided Court on April 18, 1957 reversed a judgment for $570,000, entered in favor of appellee after a jury trial on charges of an unlawful conspiracy of Zell Motor Car Company and Packard Motor Car Company in violation of Sections 1 and 2 of the Sherman Act. [1]

Petitioner believes that a rehearing in banc is merited because the case presents for decision for the first time in this Circuit questions of the greatest importance in the field of antitrust law, and because the majority decision of April 18th is not so clearly correct as to commend itself to acceptance by the full Court as the

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1/ Service of summons on Zell could not be effected; and the case proceeded against Packard as the only served defendant.

considered view of the Circuit, -- at least not without full consideration and discussion by all the judges. The great importance of the issues was first asserted by Packard as the basis for an earlier request for an in banc hearing of its appeal, which request was not opposed by Webster.

The Factual Background

The evidence, in large part documents drawn from Zell's and Packard's files, warranted a finding of the following facts by the jury. [1]

For some years prior to World War II Packard cars had been marketed in the greater Baltimore Metropolitan area through Zell as the sole distributor. He appointed sub-dealers, of whom Webster was one from 1937 to 1942. Because of Zell's unrestricted power to revoke the sub-dealerships at will, he was able to, and did, control their operations with an iron hand. They were required to obtain cars and parts from Zell at his prices. They had to limit trade-in allowances to amounts approved by Zell. They could not sell to persons whom Zell wanted for himself. They could not charge less than Zell directed for service; nor advertise without his prior approval (See Appellee's brief p. 17).

After the war Packard changed to a multiple dealership set-up in Baltimore, under which dealers were franchised directly by Packard, and obtained their cars and parts directly from Packard at uniform prices, and were free to compete with one another as to sale prices, trade-in allowances and cost of service. Zell and Webster and two other dealers held such direct franchises in 1951.

The multiple dealership system was of great value to the Baltimore public as compared with the earlier arrangement under which the prices of everything connected with Packard cars and service were set by Zell at levels designed to yield him maximum returns.

1/ The facts are stated in great detail, with supporting record references, at pp. 2 to 21 of appellee's brief on appeal.

In the summer of 1951 Zell persuaded Packard to reduce the number of dealers from four to three on an assertion that the competition of other Packard dealers was causing him to operate "in the red", and that he was unwilling to continue in such a situation. On January 29, 1952 Zell renewed this assertion and threatened to give up his franchise unless Packard eliminated Webster and the other competing dealer.

Zell's statement that he was losing money because of the competition of the other Packard dealers was not true. His operations were in fact profitable; but in the closing months of each year they were converted into book losses by retroactive substantial increases of already ample salaries, doubtless for tax purposes. Packard knew this from the monthly operating reports required of all dealers. It repeatedly recommended and Zell ignored changes in operating and control techniques which Packard said would have increased Zell's profits from forty to sixty thousand dollars a year. (See Appellee's brief p. 6-8 and footnotes)

On February 11, 1952 Packard secretly agreed with Zell to do as Zell requested by refusing to renew the franchises of Webster and the other dealer when they expired on April 1, 1952. The franchises were not renewed, and the dealers were told that their termination was final. Packard gave them no reason for doing so.

All Packard dealer franchises (as is true of many makes of automobiles and other products) are written for one year periods expiring automatically each March 31st. Packard customarily renewed its dealers franchises from year to year in the absence of grounds for cancellation for cause because of conduct of the dealer.

Packard had no basis for cancellation of Webster's and the other dealer's franchises for cause. They were both satisfactory dealers and each was making money. Webster's gross business in 1951 was $641,769.41. Packard had neither considered nor contemplated their

non-renewal until Zell's demand.

There were special reasons for continuing Webster as a dealer. For many years he had sold more Packard cars than any other salesman. When his show-room was destroyed by fire in 1949, and he hesitated to make the $100,000 investment necessary to replace it, Packard urged him to do so and assured him that his franchise would be continued for many years.

There was no shortage of Packards. Enough were available to enable each of the dealers to make money.

The competing multiple dealership set-up in Baltimore had been established by Packard, and was acceptable to it, and would have been continued except for Zell's secret demand.

Packard concealed its agreement with Zell from the two dealers. It made no attempt to test the reality of Zell's threat to resign, nor to persuade him to continue. It did not seek a substitute to fill his place if he carried out his threat. Nor did it inquire whether Webster could enlarge his operations to take up the slack which would be caused if Zell quit.

On Webster's objection to the unexplained non-renewal of his franchise, Zell and Packard secretly agreed upon July 1, 1952, as a cut-off date acceptable to Zell, and tried to get Webster to agree to a new franchise limited to the period up to July 1. On Webster's refusal and continuing objection to its cancellation, Packard and Zell agreed in May 1952 that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to an agreement between Packard and Zell, not disclosed to Webster, that Webster's franchise would not be renewed thereafter. Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "reprieve of a death sentence". Packard refused to give such assurances, and Webster declined the offer because of this refusal.

There was evidence that following establishment of Zell's exclusive dealership he reverted to his former monopolistic practice of regulating the Baltimore Packard business at the point of maximum returns to him notwithstanding the injury to the public through loss of the advantages stemming from a competing dealership arrangement.

There was no evidence that the availability of other makes of automobiles made such monopolistic overcharging impossible. On the contrary there was evidence on which the jury could have found -- as apparently it did under the judge's charge--that notwithstanding the existence of other cars of various characteristics, prices and buyer appeal, there exists a Packard market in which multiple dealer competition is of great value to the public

Proceedings Below and on Appeal

The trial court (Holtzoff, J.) submitted the case to the jury under a charge which is printed in full as Appendix A to the present petition. Following a verdict for Webster for $190,000 (which the court trebled), Packard's motion for judgment n. o. v. or new trial was denied for the reasons stated in the Court's opinion reported at 135 F. Supp. 4. Packard appealed; and Webster cross-appealed as to the correctness of the trial court's reasons for fixing the amount of plaintiff's attorney's fee

On April 18, 1957, the majority of a divided court (Edgerton, C. J., and Prettyman, J.) held that it was improper to submit the case to the jury and that the motion for judgment n. o. v. should have been allowed. The Opinion is printed as Appendix B hereto. The majority declared that exclusive dealerships are per se lawful "when not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels." They did not discuss the tests for determining when a "scheme to monopolize" exists; nor what is meant by "effective competition at both the seller and buyer levels." They did not comment on or evaluate the significance of the

evidence in this case outlined above. To the majority this was unnecessary because of their reliance on the Supreme Court decision in the so-called "celiophane case", United States v. du Pont & Company, 351 U.S. 377. They construed it is holding that there can be no monopoly or attempt or conspiracy to monopolize when the commodity involved is a particular make of automobile. The majority states that du Pont holds that there is "reasonable interchangeability" between Packard cars and other cars; which is in effect a holding that as a matter of law there is "effective competition" between Packards and other makes. This all amounts to a holding that in view of du Pont a manufacturer of automobiles can do whatever he pleases as to his distribution without ever violating the Sherman Act.

The dissenting Judge (Bazelon, J.) held that the trial court's instructions correctly stated the law applicable to conspiracies or combinations in restraint of trade in violation of Section 1 of the Sherman Act, and his belief that the evidence warranted submission to the jury and supported its verdict. He stated that the jury might well have found, as apparently it did, that Webster's elimination was not the result of a "unilateral decision by Packard in selecting its customers", but rather the result of an agreement stimulated by Zell to eliminate a competitor. He called attention to decisions and authoritative statements to the effect that vertical agreements to exclude a competitor from a substantial market are no less violations of the Sherman Act than horizontal conspiracies of competitors to accomplish such a result.

Thus we come to consideration of the important issues presented by the appeal, and to discussion of what we believe to be errors in the majority decision of such seriousness and extraordinary public importance as to warrant rehearing in banc.

The Exclusive Dealership Issue Under Section 1 of the Sherman Act

In ruling that it was erroneous to leave to the jury the determination of the reasonableness or unreasonableness of the restraint alleged to have been imposed on interstate commerce in violation of Sec. 1, the majority, quoting from a speech by Professor Milton Handler, said:

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of per se legality' until the District Court decided the present case."

However, just prior to this, the majority, on its interpretation of du Pont, denied the possibility of any "scheme to monopolize" a single make of automobile. This it did by concluding that "effective competition" is ever-present among all makes of automobiles. It reasoned that duPont stands for the proposition that as a matter of law, the relevant market for determining effective competition encompasses all makes of cars.

The majority opinion in effect lays down for the first time the rule that an exclusive dealership in a trade-marked product is per se lawful although it is established because of the threat of a large dealer to quit buying from the manufacturer unless he stops selling to all the other then-competing dealers, provided competition from other somewhat similar trade-marked articles remains at both the manufacturer's and the preferred dealer's level.

There are many companies (e.g., RCA, John Deere, Esso, Chevrolet, Harley Davidson, etc.) which market their products through competing, independent dealers, many of whom have large capital investments in their business. The average capital investment of the forty thousand new car dealers in this country is $118,000. The

majority decision is an open invitation, with a grant of complete immunity under the Sherman Act, to every high-overhead dealer who is tired of competing with smaller, lower-overhead and frequently more efficient dealers to do as Zell did and force the manufacturer to boycott the competing dealers by threatening to quit if he refuses.

The majority rule conflicts with the following authorities, all dealing expressly with the tests which must be applied in determining whether an exclusive dealership is lawful or unlawful:

> United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898); 175 U. S. 211
>
> United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S. D. N. Y. 1942, aff'd in part, 321 U. S. 707 (1944)
>
> Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534 (7th Cir. 1953), cert. denied, 345 U. S. 942 (1953)
>
> Bascomb Launder Corp v. Telecoin Corp., 204 F. 2d 331 (2d Cir. 1952); cert. denied, 345 U. S. 994 (1953)

None of the above authorities declared an exclusive dealership per se lawful. On the contrary, they all regard an exclusive dealership as neither per se lawful nor per se unlawful, and hold that its place within or without Section 1 of the Sherman Act depends on whether, on the facts of each case as measured by the Rule of Reason laid down in Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911), the restraint imposed is reasonable or unreasonable.

In the Bascomb Launder Corp. case, Judge Rifkind's elaborate exclusive dealership analysis in Bausch & Lomb was paraphrased as follows:

> If there is no monopoly, the restraint is not unreasonable if it is
>
> (a) ancillary to a reasonable main purpose, and
> (b) fairly protective of the exclusive dealer's interests but not so large as to interfere with the interests of the public.

Further proof that there is no such thing as a per se lawful exclusive dealership, and certainly not when set up by collaboration to eliminate a preferred dealer's competitors, is found in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955). After reviewing the exclusive dealership cases, the Committee stated (p. 29):

> "In accord with this reasoning, the Committee concludes that where an exclusive dealership forms part of an attempt to monopolize prohibited by Section 2, or the lesser degree of unreasonable restraint prohibited by Section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is not unreasonably to foreclose competition from the dealer's market."

A moment's reflection will bring to mind a variety of exclusive dealership situations which immediately give rise to different reactions as to their fairness and the reasonableness of the restraints they impose. The setting up of an exclusive dealership when opening up a new territory is patently different from a situation where establishment of an exclusive dealership involves the elimination of, or refusal to deal thereafter with, one or more other dealers who have large capital investments in their enterprises A court's reaction to elimination of established competing dealers may well be affected by whether they were successful and desirable sales representatives. Certainly it would be affected if it were a fact that the manufacturer's output had become so small and the number of dealers so large that it was not possible for more than one to prosper

Or there may be a situation like that in the present case, where it is undisputed that there were plenty of cars to enable all the dealers to make money, and they were doing so, and the manufacturer had no complaint against any of them, and the competing multiple-dealership set-up was acceptable to the manufacturer and of great benefit to the public, and an exclusive dealership was secretly granted and the other

dealers destroyed at the request of the largest dealer who wanted an opportunity to enhance his profits through non-competitive fixing of prices to the injury of the public.

Traditionally, under the Rule of Reason, the propriety of an arrangement which affects trade and competition (as an exclusive dealership necessarily does) is judged on all the facts as to the nature of the business, the conditions before and after the arrangement is made, its actual or probable effect, the reason for its adoption, and the purpose or end sought to be attained. The District Court in the present case and the dissenting Judge on the appeal thought -- correctly as we believe -- that the reasonableness or unreasonableness of what was done was a question of fact for the jury.

The antitrust law is clear that it would have been unlawful per se if the competing Baltimore Packard dealers had agreed among themselves to fix prices in order to enhance their profits through non-competitive dealings. Yet under the majority decision, accomplishment of exactly the same kind of monopolistic price-fixing powers is declared lawful per se because it was brought about through an agreement between a powerful dealer and the manufacturer.

The invalidity of such a poles-apart distinction between horizontal and vertical conspiracies was pointed out by Judge Bazelon in the dissent where he said:

> "The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates Sec. 1 of the Sherman Act. See Standard Oil of Calif. v. United States, 337 U. S. 293, 305 (1949), explaining International Salt Co. v. United States, 332 U. S. 392 (1947)."

Admittedly if the majority's rule stands that exclusive dealerships in trade-marked articles are per se lawful simply because they are in competition with other somewhat similar trade-marked articles, a very knotty and bothersome antitrust problem will have been greatly

simplified. However, the risk involved in resorting to such a shortcut and thus avoiding the expense and difficulty of such lengthly and hotly-disputed jury trials as the present case is twofold:

> First, a body of important antitrust principles, carefully laid down by prior cases, one at a time, upon the Rule of Reason itself, will be toppled; and
>
> Second, gross injustice will be worked as in the present case.

In short, rules of per se legality or per se illegality simplify antitrust problems but risk undermining the Rule of Reason itself.

The majority's unprecedented announcement of a per se lawful doctrine relative to exclusive dealerships constitutes a judicial attitude very difficult to harmonize with this Court's reasoning in the case of Isbrandtsen v. United States, 239 F. 2d 933 (Nov. 9, 1956), cert. granted March 22, 1957, where it declared per se unlawful the defendants' dual-rate system. This Court, prior to Webster, had never declared so absolute a privilege. In fact, on April 2, 1957, in Barr v. Matteo, No. 13217, where the Government was claiming an absolute privilege, this Court ordered supporting briefs on the question of whether the claimed privilege might not be qualified. That there are and should be few absolute rights in law (e. g., to set up an exclusive territorial dealership), see Hudson County Water Co. v. McCarter, 209 U. S. 349, 355 (1908), where Justice Holmes said:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

The majority opinion also conflicts with a recent unanimous decision of the Tenth Circuit which cites with approval the District Court's decision in the Webster case -- Paramount Film Distributing Corp. v. Village Theatre, Inc., 228 F. 2d 721. Chief Judge Phillips

held that a jury question is presented under Section 1 in cases like the present one even though the conspiracy be vertical rather than horizontal. In discussing the alleged conspiracy to restrain unduly interstate commerce in the showing of first-run pictures in the Salt Lake City area, Judge Phillips said (p. 726):

> "So, in the instant case, if Paramount Film entered into an agreement, express or implied, with United and Intermountain to favor Intermountain in the distribution of first-run pictures and to deny the Villa Theatre the right to bid for first-run pictures and to show day and date pictures, for the purpose of suppressing the competition of the Villa Theatre with Intermountain and to unreasonably restrain trade or commerce in first-run pictures in the Salt Lake City area, such agreement was unlawful and actionable."

(By substituting "Packard" for "Paramount Film" and "Zell" for "Intermountain," and "Packard cars" for "first-run films," the analogy is self-evident.)

Likewise the majority's conclusion that such exclusive dealerships are per se legal conflicts with the following cases:

> Albert Pick-Barth Co. v. Mitchell Woodburg Corp., 57 F. 2d 96 (1st Cir. 1932), cert. denied, 286 U. S. 552 (1933) (At. p. 102 the Court said: "If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition such a conspiracy, we think is a violation of Section 1 of the Sherman Act. . .")
>
> William Goldman Theatres, Inc. v. Loew's, Inc., 150 F. 2d 738, 742, 743, (3rd Cir. 1948), cert. denied, 334 U. S. 811 (1948)
>
> Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (1st Cir. 1952), cert. denied, 344 U. S. 817.

In conclusion we respectfully submit that the proper rule, founded on the Rule of Reason itself and avoiding the unique and limited nature of du Pont, was stated by Judge Bazelon is his dissent when he said:

> "I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of Section 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination below of a conspiracy to monopolize in violation of Section 2 may also be sustained."

However, because we believe the majority opinion's fundamental error stems from a misunderstanding of and unwarranted extension of the rule laid down in du Pont; and because recent developments indicate that the Supreme Court will not condone this interpretation and extension of du Pont, we now turn to consideration of that case:

Section 2 Monopoly Issues and the du Pont Case

The majority's ruling that du Pont "makes clear" that "there was no monopoly, or attempt or conspiracy to monopolize within the meaning of the Sherman Act" conflicts seriously with the reasoning of the Supreme Court, and extends the decision into an area expressly excluded by that Court from its decision.

A. du Pont considered "relevant market" a question of fact, and its treatment indicates that the Court regards this issue as always one of fact on all the evidence in each case.[1] The majority opinion here, on the other hand, treats the matter as a question of law. This was

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[1] The majority opinion in du Pont said, "This Court must determine whether the trial court erred in its estimate of the competition afforded cellophane by other materials" (p. 381); "It is logical that some agreements and practices are invalid per se, while others are illegal only as applied to particular situations" (p. 387); "What is called for is an appraisal of the 'cross-elasticity' of demand in the trade. The varying circumstances of each case determine the result" (pp. 394-95); "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration" (p. 404). At pp. 397 to 405 various facts relating to cellophane and flexible packaging materials were discussed in great detail as a necessary preliminary to decision as to the trial court's ultimate finding of fact.

Mr. Justice Frankfurter in his concurring opinion says that decision as to alleged violation of Section 2 "cannot be established by general phrases. It must be determined with reference to specific facts upon considerations analogous to those by which Section 1 of the Sherman Act is applied" (p. 413), and quotes with approval Mr. Justice Brandeis' statement in Board of Trade of the City of Chicago v United States, 246 U.S. 231, 238, as to the necessity of deciding each case on its own facts.

The extended analysis of the facts in the opinion of the three dissenting du Pont judges indicates their position also that decision as to the industry or commodity before the court in each particular case must be based on the facts of each case. See du Pont pp. 415-424.

because of their unjustifiable acceptance of a statement as to automobiles and soft-drinks in Mr. Justice Reed's opinion as though it were the considered judgment of the Supreme Court that there cannot be a Section 2 violation with respect to any particular make of automobile.[1]

It is also to be noted that in du Pont the competition found as a fact to be important was that between cellophane and other flexible packaging materials, not the competition among cellophane producers. In contrast, in Webster the jury on substantial evidence and under specific instructions found as a fact that competition between Packard dealers was more important to the public than competition between Packards and other makes of cars.[2]

1/ The statement quoted and relied on by the majority reads as follows (p. 393): "This power" (over price and production of a manufacturer's product) "that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." This statement is not even a dictum to the effect given it by the majority. All that Mr. Justice Reed said was that the power which an automobile or soft-drink manufacturer has over the price and production of his commodity does not of itself make an illegal monopoly. He went on to say that "illegal power must be appraised in terms of the competitive market for the product." As we have pointed out, all members of the Supreme Court in du Pont hold that the existence and extent of any competitive market is a particular question of fact. The statement of the majority that other makes of cars are "reasonably interchangeable" with Packards is not supported by evidence to that effect; and there was much evidence to the contrary.

2/ The trial court instructed the jury: "Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected the interest of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury."

It also charged that plaintiff could not recover unless the jury found that there existed an "unlawful conspiracy or agreement (which) adversely affected the interests of the public." There was ample evidence to support a finding of such injury from Zell's dominance of the Baltimore Packard market, notwithstanding the existence of some measure of competition between Packard and other makes of automobiles.

B. The majority erroneously holds that du Pont precludes as a matter of law a decision that there was an attempt or conspiracy on the part of Zell, aided and abetted by Packard, to monopolize in the present case. [1]

The present case does not involve a Section 2 charge of one-company monopoly, as du Pont did. To the extent that Webster's case rests on Section 2, it is on the basis of an unreasonable and illegal conspiracy or agreement to eliminate multiple competing Packard dealerships theretofore established by Packard and wholly satisfactory to it and of great value to the public, and to put Zell in a position where he could monopolize the Packard market in that large area - to the disadvantage of the public.

Unfortunately not until three months after the oral argument on appeal did the scholarly article of Donald F. Turner, Professor of Antitrust Law, Harvard Law School, appear in the December 1956 issue of the Harvard Law Review under the title "Antitrust Policy and the Cellophane Case". In this article, not heretofore brought to this Court's attention, Professor Turner said at P. 305:

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal, 'though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. United States v Socony-Vacuum Oil Co , 310 U. S. 150, 225 n. 59 (1940).'"

1/ At p. 3 the majority in the April 18th decision says "And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market." (Italics supplied) Coming as it does after the majority's ruling that du Pont holds that there was "reasonable interchangeability" between Packards and other automobiles this statement amounts to a holding that where a manufacturer cannot be convicted under Section 2 of a one-concern monopoly, it is impossible to establish his violation of Section 2 through an attempt or conspiracy to monopolize that commodity.

and at P. 307.

> "It is reasonable to discard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may be appropriately condemned per se."

The majority's interpretation improperly makes du Pont applicable in the area of conspiracies and attempts to monopolize, in the face of the fact that this area was expressly excluded by the Supreme Court from its decision in that case. The Supreme Court said, at p. 379: "The appeal, as specifically stated by the government, 'attacks only the ruling that du Pont has not monopolized trade in cellophane'. At issue for determination is only this alleged violation by du Pont of Section 2 of the Sherman Act"; and, at p. 381, that "the government specifically excludes attempts or conspiracies to monopolize from consideration."

To treat du Pont, as the April 18th opinion did, as a decision that there can be no Section 2 violation with respect to a commodity the maker of which might not be convicted of a one-concern monopoly thereof, amounts to saying that by du Pont the Supreme Court overruled a long line of its earlier decisions affirming convictions for conspiracies or attempts to monopolize in cases involving only parts of a market or parts of interstate commerce.

That the Supreme Court had no such intention is clear from Mr. Justice Reed's citations in support of his statement at p. 395 that "illegal monopolies under Section 2 may well exist over limited products in narrow fields where competition is eliminated"; and his comments and citations at pp. 386-7 with respect to the "Rule of Reason" in antitrust law.

C. We also direct attention to the comments of the dissenting Justices in du Pont on the obvious economic fact that notwithstanding the possibility of a point somewhere where interchange of commodities

will occur, there nevertheless exists an area short of the interchange point where the public and small business need protection under the Sherman Act. At pp. 424-5 they say:

> "The majority hold in effect that, because cellophane meets competition for many end uses, those buyers for other uses who need or want only cellophane are not entitled to the benefits of competition within the cellophane industry. ...As the recent report of the Attorney General's National Committee to Study the Antitrust Laws states: 'In the interest of rivalry that extends to all buyers and all uses, competition among rivals within the industry is always important (emphasis added).' Furthermore, those buyers who have 'reasonable alternatives' between cellophane and other products are also entitled to competition within the cellophane industry, for such competition may lead to lower prices and improved quality."

An excellent discussion of the validity of these principles in cases involving automobiles appears in 40 Minn. Law Review 853 (June 1956) under the title "Resurgence of Exclusive Territorial Distributorships as an Antitrust Problem". The article concludes that the District Court's handling of the present case was sound.

We doubt that this Court will want to go on record as excluding the applicability to the present case of the principles just quoted, in view of the fact that the evidence clearly showed the injury done the public by Zell during an earlier period when he had a Baltimore monopoly and evidence of his greedy desire for a return of monopolistic gouging.

There has been a notable change in the make-up of the Supreme Court since the 4 to 3 decision of du Pont. The present Court has shown an extreme sensitivity to interpretations of du Pont by its unusual treatment of the petition for certiorari in Lawlor v. National Screen Service Corporation, 352 U. S. 992-995. The District Court had ruled that an exclusive distributorship arrangement was per se unlawful. The Circuit Court reversed and remanded on the ground that issues of fact

requiring trial were presented. In its opinion it made statements as to what du Pont held. The Supreme Court -- agreeing that remand was proper -- granted certiorari only for the purpose of stating to the District Court in a per curiam decision that it need not be bound by what the Circuit Court had said about du Pont.

Erroneous Treatment of Renewal Offer

The majority opinion would lead a reader to believe incorrectly that appellee refused a "usual renewal" of his franchise at a time when he was still a franchised dealer. The evidence is clear that in February 1952 Packard secretly agreed with Zell that it would give him his requested Baltimore monopoly on March 31, 1952 by not renewing the franchises of the competing dealers which expired on that date; that the franchises were not renewed on their expiration and the dealers were told that the terminations were final; that on Webster's objection to this treatment Zell and Packard secretly agreed on July 1, 1952, as a cut-off date acceptable to Zell and tried to get Webster to agree to a franchise limited to the period up to July 1; that on Webster's refusal and continuing criticism of the cancellation, Packard and Zell agreed in May 1952 that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to an agreement with Zell, not disclosed to Webster, that its franchise would not be renewed thereafter; that Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "reprieve of a death sentence", and that Packard refused to give such assurances, and that Webster declined the offer because of this refusal.

Judge Bazelon correctly stated that the District Court properly left to jury decision the questions whether the renewal was offered in good faith or pursuant to a secret agreement between Zell and Packard that it was to be the last renewal.

Of 10 Largest Cities in 1952, Other 9 Averaged 12 Packard Dealers

Packard's Washington Zone Manager, Beck, admitted that before Zell's "ultimatum" (J. A. 260), he (Beck) had never recommended that Baltimore become a one-Packard dealer city (J. A. 265). Braden, Beck's predecessor, testified that while Packard Zone Manager from 1945 to 1950, he had never thought that one Packard dealer could handle Baltimore (J. A. 442).

The majority opinion states, however:

> "Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry."

Assuming there were 1100 such "cities", Webster has never claimed that exclusive dealerships are per se unlawful; only that they are not per se lawful.

As we pointed out at page 33 of our main brief on appeal (with record references), the $1,350,000 worth of Packard business which went to Zell in 1953 after he and Packard had wiped out Webster, was sufficient to maintain 4 of the 9 Packard dealers then competing in Metropolitan Washington, D. C.

Contrary to the inference that it was Packard's usual practice in 1952 to distribute through exclusive dealerships in large metropolitan areas, the following is a tabulation of the "Authorized Packard dealers" whose names are listed in the official Packard Motor Car Company ads in the yellow pages of the 1952 telephone directories for the ten most populous cities according to the 1950 census.

LARGEST CITIES	COMPETING PACKARD DEALERS	LARGEST CITIES	COMPETING PACKARD DEALERS
1 New York (Queens, Bronx, Manhattan and Brooklyn)	19	5 Detroit	15
2 Chicago	17	6 Baltimore	4
3 Philadelphia	12	7 Cleveland	8
4 Los Angeles	14	8 St. Louis	2
		9 Washington, D.C.	9
		10 Boston	13

Baltimore by June, 1952, had 1 Packard dealer (Zell) compared to an average of 12 in the other 9 cities.

Comments on Schwing Motor Co. v. Hudson Sales Co.

The majority opinion places great reliance on Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md 1956); aff'd 239 F 2d 176 (C.A. 4, 1957). We believe that Schwing was wrongly decided but whether or not it was is certainly not controlling here. The Maryland District Court recognized that that case differed from Webster in certain critical respects. According to Chief Judge Thomsen (pp. 905-6), "Packard gave Zell an exclusive contract in the Baltimore area and eliminated all rival dealers", whereas in Schwing, in addition to Bankert (Zell's counterpart), there were two other Hudson dealers left in the Baltimore metropolitan area after Schwing was eliminated. This enabled that Court to state (p. 904):

> "It is not alleged that the public could not have bought as many Hudson automobiles as it wishes, either from Bankert or from the two other Hudson dealers in the Baltimore metropolitan area . . . or even that it was unable to buy at competitive prices all of the Hudson automobiles that it wished to buy." (emphasis supplied).

Schwing does not involve the establishment of an exclusive territorial dealership and therefore does not justify the majority's reliance upon it.

CONCLUSION

The petition for Rehearing should be granted.

Respectfully submitted,

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ATTORNEYS FOR APPELLEE

CERTIFICATE

I hereby certify that the foregoing petition is filed in good faith and not for delay.

Donald D. Webster
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Chevy Chase, Md.

Attorney for Appellee

APPENDIX A

CHARGE TO THE JURY

1924 The Court (Holtzoff, J.): Ladies and gentlemen of the jury: This long trial has now come to an end and the issues of fact are to be submitted to you for final decision. Your decision must be reached soley on the evidence introduced at this trial. You must arrive at your conclusion deliberately, fairly, and impartially, without any feeling or emotion of any kind. The case has been ably and thoroughly presented by counsel on both sides. Of necessity a great deal of evidence, both oral and documentary, has been introduced by each party. This could not be avoided for a proper presentation of all the issues. Nevertheless, the issues to be decided by you are few and simple, and it will be my endeavor to simplify and reduce them to a minimum so as to facilitate your labors as much as possible.

The plaintiff, Webster Motor Car Company, sues the defendants, Packard Motor Car Company and two of its officers, Marshall Beck and C. M. Porter, for damages which the plaintiff claims it sustained as a result of a violation of the antitrust laws, alleged to have been committed by the defendants. It now becomes your duty to determine, first, whether the plaintiff is entitled to recovery; and second, if the plaintiff is entitled to recover, then in what amount.

1925 As I have had occasion to explain to you in other cases in which you have participated during your term of service, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of this case. You, ladies and gentlemen of the jury, are obligated to take the law from the Court, and to follow the Court's instructions as to the law. But on the other hand, you ladies and gentlemen of the jury, are the sole judges of the facts. You must determine the facts yourselves from the evidence introduced at this trial. The law authorizes the Court in its charge to the jury to discuss the

evidence for the purpose of aiding and assisting the jury in arriving at its conclusions, but the Court's discussion of the evidence, and the Court's comments on the facts and on the evidence are not binding on you and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding of the evidence differs in any respect from the Court's recollection or the Court's understanding, then it is your recollection and your understanding that must prevail for, as I said to you a moment ago, you are the sole and final judges of the facts. My instructions are binding on you only as to the law.

1926 Now, I shall begin by reviewing a few general principles of law that are applicable to this case as well as others. The burden is on the plaintiff to prove his claim, or its claim, by a fair preponderance of the evidence. The words "preponderance of the evidence" mean that in order that you may find a verdict for the plaintiff, you must be reasonably satisfied that the plaintiff's allegations are true. This requirement does not mean that the plaintiff must produce a greater number of witnesses than the defendant, but as I have just stated, merely that you must be reasonably satisfied of the truth of the allegations, of the plaintiff's allegations. I can state the same thought in a somewhat different way. "Preponderance of the evidence" means evidence of greater convincing force. The duty of the jury is to weigh the evidence carefully as in a pair of scales, and to find a verdict for the party in whose favor the evidence preponderates, that is, on whose side the scale goes down. If the evidence is evenly balanced, then the verdict must be for the defendants.

Now, previously to participating in this trial all of you were sitting on criminal cases during this term of service. In each criminal case you were instructed by the Court that the Government must prove its case against the defendant beyond a reasonable doubt. In order to prevent any confusion of thought the Court wants to make it clear to you

1927 that this rule does not apply to civil cases, and the case we are now trying is a civil case, but as I have already informed you, in a

civil case the plaintiff need make out his proof only by a preponderance of the evidence, or a fair preponderance of the evidence.

In determining the issues of fact submitted to you you will consider and weigh the testimony of all the witnesses who have testified at this trial, all of the documents that have been introduced in evidence, as well as all the circumstances concerning which testimony has been introduced because circumstances frequently throw an illuminating light on oral or documentary testimony. You are the sole judges of the credibility of witnesses. I mean by that it is for you and you alone to determine what witnesses to believe, and the weight to be attached to the testimony of any witness.

Several of the witnesses in this case did not personally testify in court. Their testimony was taken prior to the trial before a notary public, and the transcript of that testimony was read at the trial. Testimony taken in this manner is known in the law as a deposition. Such testimony is entitled to the same consideration and to the same judgment on your part with reference to its weight as is the testimony of witnesses who testified orally and in person on the witness stand. You are not to discount any testimony given by deposition merely because it comes to you in that form.

1928

This brings me to a consideration of the issues involved in this case, now that I have completed preliminarily a summary of a few general principles of law. The specific claim involved in this case is as follows: The plaintiff, Webster Motor Car Company, was a dealer in Packard cars under a contract, or a franchise, as it is sometimes called, with the defendant Packard Motor Car Company, the manufacturer. The plaintiff's place of business was located in Baltimore. In the same area there were three other Packard dealers operating in the same manner as the plaintiff, under contract or franchises with the manufacturer. The plaintiff claims that one of these other dealers, the Zell Motor Car Company, entered into a conspiracy with the defendant, Packard Motor Car Company -- that is an agreement with the defendant, Packard Motor Car Company -- to eliminate all competing dealers in the

Baltimore area, and to give the Zell Motor Car Company an exclusive right to the sale of Packard cars within the area. The plaintiff further claims that pursuant to this conspiracy or agreement, Packard refused to renew the plaintiff's contract, or franchise, as well as the contract or franchise of one other Packard dealer in this area, a man named
1929 DeBaugh, and it failed to fill the place of another dealer, Schulte, who had previously given up his business. The plaintiff further claims that Packard made, in effect, the Zell Motor Car Company the exclusive dealer for Packard cars in the Baltimore area. The plaintiff further claims that this conspiracy or agreement constituted a violation of the antitrust laws. The plaintiff seeks to recover damages caused to it as a result of being eliminated as a Packard dealer by means of such a conspiracy or agreement, and as a result of the consequent destruction of its business. It is for you to determine whether these facts have been established by a preponderance of the evidence.

The defendants admit that Packard refused to renew the franchise of the plaintiff and of DeBaugh, and that it failed to fill the place of Schulte, and that it, in effect, granted to Zell Motor Car Company an exclusive opportunity to sell Packard automobiles in the Baltimore area. The defendant claims on the other hand that this was done in the exercise of permissible business judgment and discretion, and not pursuant to any illegal conspiracy or agreement with anyone else. The defendants make still two other contentions. First, Packard claims that the plaintiff agreed to liquidate its business anyway; and second, the defendants call attention to the fact that Packard offered to the plaintiff a renewal of its
1930 contract for one year, which the plaintiff refused. The defendant seeks to draw the inference that it did not destroy the plaintiff's business but that the plaintiff refused to continue as a dealer.

The plaintiff responds by saying and contending that the defendant's offer of a renewal was not made in good faith, but that it was advanced only after Packard had decided to make Zell the exclusive dealer in the Baltimore area, and only after Packard had announced to the plaintiff that the plaintiff would no longer be permitted to remain as a Packard

dea'er. Plaintiff further claims that when the plaintiff protested against the failure to renew its contract, the defendant purely in an effort to stave off litigation, offered a year's renewal with the secret intention, pursuant to an alleged agreement with Zell, to terminate the dealership at the end of another year. The plaintiff claims that this was a belated offer on the part of the defendant Packard, and was not made in good faith, and therefore does not detract from the fact, that the defendant, Packard, destroyed the plaintiff's business.

It is for you, ladies and gentlemen of the jury, to determine from the evidence in this case what the facts were as to these various contentions and whose contentions are true.

1931 This brings me to a discussion of the law that is applicable to this case. The pertinent provisions of the antitrust law, popularly known as the Sherman Act, that no doubt many of you have heard about from time to time, and which govern the disposition of the plaintiff's claim, read as follows:

"Every contract or conspiracy in restraint of trade or commerce among the several states is declared to be illegal."

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a misdemeanor."

1932 I shall read these two provisions again because they are brief, but important, and I am reading only the provisions that are pertinent to this case:

"Every contract or conspiracy in restraint of trade or commerce among the several states, is declared to be illegal."

And second:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, shall be deemed guilty of a misdemeanor."

The word "conspiracy" as used in the statute merely means an agreement to do an illegal act, namely, an agreement in restraint of interstate trade or commerce, or an agreement to monopolize or attempt to monopolize.

In order to establish a right to recover damages the plaintiff under these statutory provisions must establish the following elements:

First. That the defendants entered into a conspiracy, that is an agreement with someone in unreasonable restraint of trade, or a conspiracy with someone, that is an agreement with someone, to monopolize any part of trade or commerce.

Second. That the trade or commerce affected by the unlawful
1933 conspiracy or agreement was interstate trade or commerce, and not merely trade or commerce within a single State.

Third. That the unlawful conspiracy or agreement adversely affected the interests of the public.

Fourth. That as a result of actions taken pursuant to the unlawful conspiracy or agreement, the plaintiff was damaged.

Now let me go back to each of these four elements and elaborate them somewhat. The first element is a conspiracy, that is, an agreement in unreasonable restraint of trade, or an agreement to monopolize any part of trade or commerce. The antitrust laws do not forbid every restraint of trade or commerce. They forbid only such restraints as are unreasonable. The second kind of conspiracy or agreement that is forbidden by the antitrust laws is a conspiracy or agreement to monopolize any part of trade or commerce. In order to recover the plaintiff is not required to prove both. The plaintiff must prove either one or the other, either an agreement to which the defendants were parties in unreasonable restraint of trade, or an agreement to which the defendants were parties to monopolize any part of trade or commerce. In
1934 this connection, it must be said that a business concern has a right to select its customers and has a right to sell its products to whomever it chooses, and it may choose one potential customer in preference to another. That is a part of the American system of free

enterprise. There is, however, this important qualification. The right to select one's customers is a right that may be exercised without ulterior motives, free from compulsion, and without agreements with others that tend to restrain trade or to create a monopoly. The law prohibits the exercise of this right pursuant to an agreement, or arrangement or conspiracy between two or more individuals or two or more business concerns, to exclude other business concerns from trade or commerce, or to create a monopoly, or substantial monopoly, for one of the parties to the agreement, arrangement, or conspiracy. The plaintiff's contention in this case is, as I have indicated, that the defendants refused to renew the plaintiff's franchise and sought to create an exclusive dealership, or a monopoly in one concern, not in the exercise of its best business judgment, but from ulterior motives, as a result of compulsion, or pressure, or an agreement with a competitor of the persons who were excluded from the field pursuant to the conspiracy. If a person enters into an illegal agreement, or conspiracy, in violation of the Sherman Law, his motive in so doing is
1935 immaterial. It makes no difference whether his motive was good or bad, whether he thought that what he was doing was permissible and was for the best interests of his business, or not. The law prohibits certain agreements in restraint of trade, or certain agreements that attempt to monopolize. The illegality is not affected by motives, good or bad. A good motive does not make an illegal agreement legal, and a bad motive does not make a legal agreement illegal. A bad intent or malice against the plaintiff need not be proved in order to justify a recovery in favor of the plaintiff.

Coming to the second element that the plaintiff must establish, namely, that the trade or commerce affected by the alleged unlawful conspiracy or agreement, was interstate commerce, the undisputed facts are that the Packard cars referred to in this case were shipped from Detroit, Michigan, or from the District of Columbia to Baltimore, Maryland. Such shipments constitute interstate commerce. The plaintiff contends that the flow of this commerce and the transportation

of cars between the factory in Detroit, or the zone office in Washington and the dealers in Baltimore, was affected and restrained by being diverted to a single dealer. If you find that there was an unlawful conspiracy to restrain trade, or to create a monopoly in this case,
1936 you also have a right to find that the trade or commerce that was affected was interstate commerce.

Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected the interests of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury.

The last element that the plaintiff must establish is that pursuant to the alleged unlawful conspiracy or agreement, the plaintiff was damaged. The plaintiff claims that its business was destroyed as a result of the alleged unlawful agreement or conspiracy between Packard and Zell. The defendant on the other hand claims that the plaintiff had
1937 agreed to liquidate his business in any event, and that further the plaintiff's business was discontinued as a result of the plaintiff's own choice in refusing to accept a renewal for another year. The plaintiff responds by saying that the refusal to accept the renewal was due to the fact that the offer of renewal was not made in good faith, and with a mental reservation to cancel the franchise at the end of another year. I have already referred to the respective contentions of the parties on this point in a little more detail. The facts are for you to determine.

Now, ladies and gentlemen of the jury, if you decide the issues in favor of the defendant, that ends the case and you will bring in a verdict for the defendants. If you decide the issues in favor of the plaintiff, then you have to take still a further step and determine the amount of damages that should be awarded to the plaintiff. The damages to be awarded by the jury should be in such amount as would in the opinion of the jury fairly and reasonably compensate the plaintiff for the financial or pecuniary loss to its business, --in other words the amount of money that the plaintiff lost in its business as a result of the illegal acts of the defendants.

The jury may not merely speculate or guess at an amount, or fix an amount arbitrarily The amount of damages to be awarded by the
1938 jury must be based on the evidence. The evidence must supply information from which the jury may determine as a matter of reasonable inference the amount that the plaintiff probably lost. This does not mean that the evidence must show the exact and precise sum of money that the plaintiff lost Ordinarily it is impossible to make an exact computation The law does not require the impossible. Otherwise the wrongdoer might entirely escape the liability of paying damages caused by his illegal acts The law throws the risk of uncertainty on the wrongdoer rather than on the injured party, for otherwise the wrongdoer could profit at the expense of his victim. It is enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, even though the result may be only approximate.

The jury has a right to form a reasonable and probable estimate, in the exercise of good sense and sound judgment, of the amount that will constitute fair and adequate compensation. The jury may make a just and reasonable estimate of the damage, based on the evidence, and render its verdict accordingly.

The measure of damages in this case is what was the value of the plaintiff's business claimed to have been destroyed by the defendant's illegal acts. In order to arrive at such a valuation the jury may consider

the evidence of net profits that the plaintiff might have reasonably expected to make during a reasonable period of time following the illegal
1939 acts of the defendants, if such acts have prevented the plaintiff from realizing such profits. Now such profits are not necessarily the final and definite measure of damages but they are an element and a circumstance that the jury may consider, together with all the other facts and circumstances in the case, in determining the amount of damages that the plaintiff has sustained in its business. The plaintiff has offered proof which it says tends to show what profits might have reasonably been anticipated as of the date of the termination of its contract, namely, March 31, 1952. It introduced evidence to the effect that business at that time was at an upswing; that the plaintiff was making profits in 1952 at a greater rate than it had made in 1951; that the outlook for business was good because the year before Packard had put out a new model that was meeting with public favor. On the other hand the defendant has offered evidence to the effect that in 1953 many dealers of approximate the same size as the plaintiff, sustained a loss instead of making a profit. The plaintiff offered evidence from its books of account, through a certified public accountant, to the effect that during the period beginning in 1946 and ending March 31, 1952, the
1940 plaintiff's net profits from the automotive business averaged approximately $36,479 a year. I said "net profits"; I should have said "gross profits."

In considering the number of years that the plaintiff would have continued in the automobile business except for the defendant's alleged illegal acts, the jury is entitled to consider the plaintiff's history of operations for the 15-year period between 1937 and 1952. The jury is also entitled to consider testimony to the effect that franchises of efficient dealers are ordinarily renewed from year-to-year for a substantial period of time.

You ladies and gentlemen of the jury are the sole judges of what period, if any, the plaintiff could reasonably have expected to continue in the automobile business were it not for the defendant's alleged illegal

acts. At the time that Packard failed to renew Webster's contract, Webster's lease on its plant had seven and three-quarter years to run. Accordingly the plaintiff claims that it is entitled to recover damages on the basis that it would have continued in business for a period of at least seven and three-quarter more years. Whether that is so or not is for you to determine. The plaintiff claims that for the balance of the term of the lease it could have anticipated a total net profit of $259, 760, using the same average profits as it had gained during the
1941 years immediately preceding 1952. In addition the plaintiff claims that it sustained a loss during the year in which it closed out its operations, a loss that it would not have sustained if its franchise had not been discontinued and it had been permitted to continue operations as it had done previously. The plaintiff claims that this loss amounted to $24, 900. You have a right, if you see fit, to consider this as an additional item of damage, giving it such weight as you consider proper.

The defendants on the other hand dispute the calculation of profits during the preceding years, that is, years preceding 1952. The defendants claim that all of Mr. Webster's salary as an officer of the company should be deducted from the gross profits, and by so doing the net profits would be reduced considerably. The plaintiff responds by contending that since the Webster Motor Car Company had other interests and activities than just the automotive business, and Mr. Webster devoted his personal attention to all aspects of the company's interests, only a small portion of his salary should be charged to the automotive business, and that is what the certified public accountant has done. It is for you to determine what the fact was and how the matter should be handled.

It is then claimed by the defendants that the average net profits
1942 for the years preceding 1952 are high because the years 1946, 1947 and 1948 were unusual years when there was a seller's market, and that the gross profits of the plaintiff were much greater in those years than they were in 1949, 1950 and 1951, and that according to the

plaintiff's own statement, the plaintiff's profits in 1950 were only $15,000, and that according to the defendant's calculations they were even less. The plaintiff responds that one reason why the profits were down in 1949 and 1950 was the fact that a disastrous fire had been sustained by the plaintiff in its plant, and that therefore those two years were not typical, and that, moreover, beginning in 1951 there was a marked upswing and and increase in profits. All these matters are for you to consider. You are not bound by the figures introduced either by the plaintiff or by the defendants, but you may give these figures such weight as you deem wise and proper. You may use them as a basis to reach a figure by a process of approximation which, in your opinion, would fairly and reasonably compensate the plaintiff for the damages it has sustained, no more, but no less, if you bring in a verdict in favor of the plaintiff.

In conclusion, your verdict should be either for the plaintiff for a specific amount of money, or a verdict in favor of the defendants. As
1943 of course you are aware, your verdict must be reached by unanimous vote. Are there any objections or requests? If so you may come to the bench.

APPENDIX B

Decided April 18, 1957

Mr. Harold L. Smith, with whom Messrs. Robert W. Barker, Louis M. Denit, Jerome G. Shapiro and Richard P. McGrath were on the brief, for appellants in No. 13152 and appellees in No. 13153.

Messrs. William J. Hughes, Jr., and Donald D. Webster, with whom Mr. William E. Leahy was on the briefs, for appellee in No. 13152 and appellant in No. 13153.

Before EDGERTON, Chief Judge, and PRETTYMAN and BAZELON, Circuit Judges.

EDGERTON, Chief Judge: Packard Motor Car Company and two of its officers appeal from a judgement for $570,000 in favor of Webster Motor Car Company, a former Packard dealer in Baltimore, for alleged violation of the Sherman Antitrust Act. 15 U.S.C. Secs. 1, 2, 15. The essential facts are not disputed.

There were formerly four dealers in Packard cars in Baltimore. In 1953 there were three, of which Webster was one. The usual dealer contract in the automobile business, and the contract between Packard and Webster, were for one year, with no option of extension. It was the custom in the business to extend contracts, from year to year, "barring some reason for cancellation." Webster and Packard had extended their contracts from year to year a considerable number of times.

In 1953 Zell Motor Car Company, the largest of the three Baltimore dealers in Packard cars, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive contract. Packard told Zell it would do so, and told Webster and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal, but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit.

The District Court submitted to the jury the question whether there was an unreasonable restraint of trade, and also whether there was an agreement or attempt to monopolize. The jury found for the plaintiff and awarded $190,000 damages, which the court trebled in accordance with the statute. Motions for judgment notwithstanding the verdict, and for a new trial, were denied. The court held that the jury had "a right to reach the conclusion that an agreement on the part of the manufacturer with one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize." Webster Motor Car Company v. Packard Motor Car Co., 135 F. Supp. 4, 9.

We think the defendants were entitled to judgment. We agree substantially with Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md. 1956), aff'd, 239 F. 2d 176 (C.A. 4, 1956).

1. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The cellophane case, which had not been decided when the present case was tried, makes this clear. The Supreme Court there said: "this power that, let us say, automobile or soft-drink manufacturers have over their trade-marked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." And the Court held that "In considering what is the relevant market for determining the control of price and competition . . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." The Court accordingly held that, although du Pont produced about 75% of the cellophane sold in this country, there was no monopoly, because "the relevant market" was flexible packaging materials, including such things as glassine, waxed paper, and foil, as well as cellophane, and cellophane accounted for only 17.9% of this market. United States v. du Pont & Co., 351 U.S. 377, 393, 395, 399-400. Since there are other cars "reasonably

interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market.

2. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the court informed the jury, it has long been clear that only unreasonable restraints of trade are unlawful. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1. When an exclusive dealership "is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of per se legality" until the District Court decided the present case.[2] Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.[3]

The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.

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2. Handler, Annual Antitrust Review, 11 Record of the Ass'n of the Bar of the City of New York 167, 170 (1956). Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534 (C.A. 7), cert. denied, 345 U.S. 942 (1953); Barcom Launder Corp. v. Telecoin Corp., 204 F. 2d 91 (C.A. 2), cert. denied, 345 U.S. 994 (1954); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398-399 (S.D.N.Y.), aff'd, 321 U.S. 707, 719 (1944); Cf. G. & F. Amusement Co. v. Regent Theater Co., 107 F. Supp. 453, aff'd, 210 F. 2d 740 (C.A. 6); Bond Hall Corp. v. General Motors Corp., 124 F. 2d 858 (C.A. 2); Hudson Sales Corp. v. Waldrip, 211 F. 2d 708 (C.A. 5).

3. Handler, supra note 2, at p. 176.

3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proferred renewal expired is immaterial, not only because the agreement was legal but also because it inflicted no damage.

The judgment in favor of Webster is reversed. Webster's cross-appeal concerning the amount of Webster's attorneys' fee is dismissed as moot.

No. 13152 reversed;
No. 13153 dismissed.

BAZELON, Circuit Judge, dissenting: Webster and Zell were competing Packard automobile dealers in Baltimore. In 1952 Packard served notice of termination of Webster's dealership, but then, after Webster's protest, offered to renew the dealership for only one year without further renewal.

I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of Sec. 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination below of a conspiracy to monopolize in violation of Sec. 2 may also be sustained.

There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that Packard had found Webster to be a satisfactory dealer with a good organization; that there was an "understanding" between Zell and Packard, and that Packard had "agreed" with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal. As a Packard memorandum put it: "This . . . was reviewed in detail and

agreed to by Mr. Zell."

From this evidence the jury could have found -- as it apparently did -- that Webster's elimination as a dealer resulted not from a unilateral decision by Packard in selecting its customers, but rather from an agreement between Packard and Zell to eliminate Zell's competitor and make Zell the sole distributor of Packard cars in Baltimore; in simple terms, that it was an agreement which amounted to a combination or conspiracy to get rid of Webster. 1/

The "common right" of an individual to engage in a lawful calling was protected against restraints at common law, 2/ is encompassed within the protection of the Fourteenth Amendment 3/ and forms the very basis of the Sherman Act 4/ The purpose of the Act is to protect the individual business man as well as to assure to the consumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another 5/

1/ We are not called upon to decide whether Sec. 1 of the Sherman Act applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers Cf. Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899, 906 (D. Md 1956), affirmed, _____ F. 2d____ (4th Cir. 1956) That is not this case.

2/ Darcy v Allen, 11 Coke 84b, 77 ENG. REP. 1260 (1576).

3/ Butcher's Union v. Crescent City Co., 111 U.S. 746 (1884), concurring opinions of Mr Justice Field and Mr. Justice Bradley.

4/ Apex Hosiery Co v Leader, 310 U.S. 469, 497-98 (1940).

5/ Even individually conceived refusals to deal may be an element in a violation of Sec. 1 of the Sherman Act. United States v. Bausch & Lomb, 321 U.S. 707, 723 (1944); Federal Trade Comm'n v. Beech-Nut Co., 257 U.S. 441 (1922); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), at 134; cf. Dr. Miles Medical Co. v. Parks, 220 U.S. 373 (1911).

Schwing Motor Co. v. Hudson Sales Co., 138 F. Supp. 899 (D. Md. 1956), affirmed, _____ F. 2d ____ (4th Cir. 1956), disagrees with the decision here under review. The latter case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. Schwing would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the commodity." 138 F. Supp. at 906. In this I think Schwing is wrong. The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates Sec. 1 of the Sherman Act.[6/]

To avoid the application of the Sherman Act Packard contends that, because Webster rejected the proferred one-year renewal, the jury could not find that Packard refused to deal with Webster. But this contention is not persuasive. The record contains ample evidence from which the jury could have found that the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal.

6/ See Standard Oil of Calif. v. United States, 337 U.S. 293, 305 (1949), explaining International Salt Co. v. United States, 332 U.S. 392 (1947).